

1 Fifty-five is Terry Davis' summary of the amounts  
2 billed to the Complainants but not paid. It's  
3 essentially the difference between what we have  
4 invoiced, which is what we contend is the fair market  
5 value for the attachments and the amounts that they  
6 have paid.

7 JUDGE SIPPEL: And this is a summary of  
8 those billings?

9 MR. LANGLEY: Yes, it is. It is part of  
10 Terry Davis' testimony.

11 JUDGE SIPPEL: Any objection to that?

12 MR. SEIVER: It's news to us, Your Honor.  
13 I had never seen any analysis like this. She  
14 obviously must have prepared it for her deposition  
15 testimony, and I think it's incomplete, but obviously  
16 I could point it out that, you know, the amounts that  
17 they billed were based on this fair market value, and  
18 so to show a current balance of \$35 million is  
19 misleading, especially sine -- and there's no time  
20 frame on this particular set of payments. You know,  
21 the Commission had already ordered that those rates  
22 that they had been billing at were struck down, and

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1 that the amounts we paid were what's in order.

2 So I think it's a misleading document,  
3 Your Honor.

4 MR. LANGLEY: I'm sure Mr. Seiver will  
5 cross examine Terry Davis at length about that.

6 JUDGE SIPPEL: Well, I mean, it doesn't  
7 even have any dates in here. Summary of Complainant  
8 billings, it doesn't even have a period of time.

9 MR. LANGLEY: The dates are actually in  
10 Terry Davis' direct written testimony, and she makes  
11 reference to this exhibit.

12 JUDGE SIPPEL: Well, we could go back and  
13 forth on this, but personally, I think it's de  
14 minimis. I'm looking for what it is in the context of  
15 her testimony or her affidavit, not in some abstract  
16 basis as it's inserted here, but in some one page, and  
17 we are going to get to it anyway. So I think it is  
18 just as much to do about nothing to spend much time on  
19 it.

20 I hear Mr. Seiver's. I'll take it in the  
21 form of an objection. It's a good objection, but for  
22 practical reasons, I'm going to overrule it. That's

1 with respect to 55.

2 Fifty-four, again, the proffer of  
3 relevance, I'm accepting that.

4 Let me make my ruling and then I want to  
5 come back to something about 54. The Gulf Power  
6 tabbed documents 54 and 55 are now identified for  
7 receipt in evidence as Gulf Power Exhibits 54 and 55,  
8 and they are hereby received into evidence as Gulf  
9 Power's Exhibits 54 and 55.

10 (Whereupon, the documents  
11 referred to were marked as Gulf  
12 Power Exhibit Nos. 54 and 55 for  
13 identification and were received  
14 in evidence.)

15 JUDGE SIPPEL: And I just had to make a  
16 quick comment on the concept of a roll forward ledger.  
17 I have some ideas as to what a roll forward ledger is,  
18 but I really don't know what your business use of that  
19 terminology is, and what I'd like to ask you to do is  
20 to go through these exhibits and any other place that  
21 you're going to have evidence, and if there is a term  
22 of art that's peculiar for business usage or whatnot,

1 if you wouldn't mind just preparing a glossary of it  
2 for me and certainly show it to Mr. Seiver before you  
3 give it to me.

4 Well, that speaks for itself.

5 Okay. What would be the next grouping  
6 then, Mr. Langley?

7 MR. LANGLEY: Fifty-six through 65.

8 JUDGE SIPPEL: Fifty-six through 60 --  
9 where are you going?

10 MR. LANGLEY: Through 65. I'll tell you  
11 what. Why don't we take it in smaller chunks and deal  
12 with the remainder of Notebook 4 of 5. Is that  
13 acceptable?

14 JUDGE SIPPEL: That's what I was just  
15 going to ask you to do. Fifty-six through 62.

16 Now, Mr. Seiver, as that is how we're  
17 doing this, are there any of those documents, 56  
18 through 62, that either you or Mr. Cook has -- that  
19 you want to comment on or have objection to?

20 MR. SEIVER: Yes, Your Honor. To get it  
21 out of the way though, 56 we have no problem with.  
22 That's the CV of Mr. Spain. I believe that was marked

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1 at his deposition, and so we have no problem.

2 JUDGE SIPPEL: The CV being curriculum  
3 vitae?

4 MR. SEIVER: Yes. Yes, Your Honor. I'm  
5 sorry.

6 JUDGE SIPPEL: That's his pedigree. Okay.

7 MR. SEIVER: Fifty-seven, 58 and 59 are  
8 the three CHELCO agreements that were the subject of  
9 the separate motion to compel that Gulf filed which we  
10 objected to and Your Honor ordered us to produce them,  
11 and my understanding from your order was that there  
12 was a limited reason for the production which would  
13 not include them being part of the evidentiary  
14 submission of Gulf Power's case, but only for cross-  
15 examining our witness on construction standards.

16 JUDGE SIPPEL: Mr. Campbell?

17 MR. CAMPBELL: Yes, Your Honor. I will  
18 respond to that.

19 I was not involved with the motion to  
20 compel, and I don't believe Mr. Spain, who is an  
21 expert that we have proffered testimony from -- his  
22 testimony was not developed at that point in time. He

1 relies on these CHELCO agreements to be additional  
2 evidence of the unregulated market that exists out  
3 there for pole attachment rates.

4 We have ILEC agreements in there. There  
5 are municipal utilities who have attachments on their  
6 poles. There are cooperatives out there. All of that  
7 underpins Mr. Spain's testimony and is highly relevant  
8 to that testimony.

9 I don't think that was fully fleshed out  
10 at the time you made your ruling on the motion to  
11 compel, and of course, as we've pointed out with  
12 respect to Ms. Davis' documents, the documents have to  
13 be considered in the context of the testimony that is  
14 referring to the documents, and I think Mr. Spain's  
15 testimony brings that into focus, that additional  
16 relevance item.

17 And then Mr. Seiver has pointed out that  
18 the construction specification issue was made relevant  
19 by their expert witness who talks about, quote,  
20 unquote, industry standard, and so we will cross  
21 examine him on those issues.

22 But these exhibits are relied upon by our

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1 expert as underpinning several components of his  
2 testimony.

3 MR. LANGLEY: I might need to formally  
4 move to strike that part of Mr. Spain's testimony that  
5 relies on them because in Your Honor's order it said  
6 use of CHELCO agreements will be permitted but only  
7 for cross examination, thereby eliminating  
8 Complainants' concerns of burden.

9 MR. CAMPBELL: Again, Your Honor, I don't  
10 think you were considering Mr. Spain's testimony at  
11 that time. It was a motion to compel discovery  
12 ruling. The testimony had not been fleshed out.  
13 These documents are very similar to the ILEC  
14 agreements that have already been admitted into  
15 evidence without objection from the other side.

16 So I don't know what the burdensome nature  
17 of them is. It just is another part of that  
18 unregulated market.

19 JUDGE SIPPEL: Well, he's right. My  
20 ruling, I was looking for a handle on relevancy, and  
21 since we're talking about compensation in a regulated  
22 market and those agreements have to do with an

1 unregulated market, you know, in a lot of contexts  
2 that really makes them apples and oranges.

3                   However, --

4                   MR. CAMPBELL:   Actually it brings them  
5 more into the world of apples and apples under the  
6 lost opportunity prong and what we have lost out there  
7 because the rate and the sufficiency of the rate has  
8 always been an issue in this case, and what they're  
9 saying is that this is adequate compensation, that  
10 there's no market out there that you can demonstrate  
11 that you are being deprived of participating in and  
12 extracting higher fair market rates.

13                   And we say, "Wait a minute.  You're wrong  
14 about that.  There is a market out there.  It's a  
15 market that is not regulated," and here they are,  
16 agreements Complainants have entered into.

17                   JUDGE SIPPEL:  That's precisely the reason  
18 that I ruled the way I did.  Your side would have the  
19 opportunity to cross examine his experts with that  
20 document to show just the point that you're making.  
21 I never anticipated seeing it become a part of your  
22 case-in-chief.

1 MR. CAMPBELL: We understand, Your Honor,  
2 that on the issue of this hearing order and what was  
3 set, that we have the burden of proof. We have to  
4 make it part of our case-in-chief. Otherwise that  
5 item doesn't come in in our case-in-chief, in our  
6 prima facie case.

7 We want to show as part of our prima facie  
8 case that there's an unregulated market, that there  
9 are opportunities out there that there are fair market  
10 value transactions. There are arm's length  
11 transactions, and the Complainants themselves enter  
12 into these arm's length transactions at rates that are  
13 multiples of the rates they're paying us under the  
14 federal scheme.

15 So, you know, we have an expert. He has  
16 testified about them. They could cross examine our  
17 expert, and so the shoe fits just as easily for them,  
18 I think.

19 JUDGE SIPPEL: Well, I'm assuming Mr.  
20 Spain has been deposed.

21 MR. LANGLEY: Yes, he was. Mr. Cook took  
22 his deposition.

1 MR. CAMPBELL: Yes.

2 JUDGE SIPPEL: Well, was this subject part  
3 of his deposition.

4 MR. COOK: No, it was not because we  
5 didn't have the documents. They just produced them  
6 after Mr. Spain's deposition

7 MR. LANGLEY: But, Your Honor, Mr.  
8 Campbell's request to have all of this kind of stuff  
9 in about the unregulated market, I think you wisely  
10 asked what unregulated market there.

11 But the important thing is we have to come  
12 back for a touchstone of relevance to the APCo  
13 standard, showing that they cannot accommodate a new  
14 attacher because the full capacity and a lost cause by  
15 the Complainants. The words used by APCo for closed  
16 a sale, out more money, they have to show proof of  
17 loss. That's the constitutional touchstone of this  
18 case, loss to the owner, the basis of their taking  
19 this claim for just compensation.

20 So how have our clients, the Complainants'  
21 attachments, caused specific loss on the specific  
22 poles? And the universe for this hearing is their 50

1 and our 50. What possible relevance could the -- what  
2 our clients pay somebody else who might not be in this  
3 case a municipal entity not regulated by Section 224,  
4 how does that relate to a loss that we have caused  
5 them on their poles?

6 The answer is none, and to the extent they  
7 say, "Well, Your Honor, but we've lost an opportunity  
8 to charge what we believe is fair," hey, what they  
9 like to call a fair market value in the market. The  
10 APCo court, if you will draw your attention to  
11 311.1369, approximately, where it says, you know, the  
12 utility industry is saying that they have a lost  
13 opportunity merely by not being able to charge what  
14 they would like to charge, and it rejects that  
15 explicitly. Right there that is a critical section  
16 where they say, you know, you can't just say that even  
17 though you're not out any more money, that you have a  
18 loss for purposes of the Constitution that will  
19 satisfy the standard; just because you can't charge  
20 what you think you'd like to charge and what other  
21 people who aren't covered by the statute might be able  
22 to be billed doesn't mean that they have a loss caused

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1 by us on specific poles.

2 And that's the lack of relevance here and  
3 in a number of other exhibits that we're about to deal  
4 with as well.

5 JUDGE SIPPEL: Okay. Well, I'm not going  
6 to have to hear any more on this. I'll tell you what.  
7 You know what the purpose of today is. This is going  
8 to come in one way or the other. There's no question  
9 about it. I mean either cross examination or their  
10 case-in-chief.

11 Your argument is going to be the same no  
12 matter how it comes in, and I'm going to have to  
13 address it no matter how it comes in, and I think that  
14 the Commission would want to see this subject matter  
15 to handle.

16 I think if we just extracted that from the  
17 case as being irrelevant under the Alabama decision,  
18 I think it's courting serious problems down the road  
19 in terms of remand.

20 So I'm going to have to look at this in  
21 some way, shape or form. So, you know, if it's that  
22 clear, if you could delineate it that surgically in

1 findings, you're going to have to advance a very  
2 strong case.

3 My initial reaction to it was just as I  
4 ruled. It was a discovery -- Mr. Campbell is right --  
5 it was a discovery ruling, and I found a handle by  
6 which they should get it in discovery. That's all I  
7 did.

8 Mr. Seiver read my language. I definitely  
9 was stronger than just that, but if it's a  
10 reconsideration, I'll reconsider it. This is just,  
11 again, a discretionary evidentiary ruling, and with a  
12 lot of caveats I'm going to allow it to come in, "it"  
13 being the 58 through 59 documents, the CHELCO  
14 agreements.

15 MR. LANGLEY: Your Honor, may I presume  
16 that the Court understands that we strenuously  
17 disagree with your interpretation?

18 JUDGE SIPPEL: I do, I do. But there's no  
19 point in going into it. I don't see any point in  
20 going into it now.

21 If you want to make some kind of a proffer  
22 of the relevance, by all means, do because I haven't

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1 really gotten that from you yet.

2 MR. LANGLEY: I think Mr. Campbell made  
3 our proffer of relevance. I will note for the record  
4 that there is an intense disagreement between the  
5 sides about what the Alabama Power v. FCC case means,  
6 but that's something that Your Honor will be deciding  
7 in the context of the evidence.

8 JUDGE SIPPEL: The Eleventh Circuit wasn't  
9 all that clear? Is that what I'm hearing?

10 MR. SEIVER: Not from our standpoint, not  
11 from us.

12 JUDGE SIPPEL: Okay. I'll say no more.  
13 All right. Well, if you can parse through what my  
14 ruling was, I'm going to overrule the objection or  
15 consider the objection. I'm going to consider my  
16 ruling on the objection actually in suspense perhaps  
17 as far down as the proposed findings, but I am going  
18 to in my discretion as an evidentiary matter at this  
19 point receive into evidence the exhibits, the Tab 58  
20 to 59 documents.

21 And in fact, now I'm going to rule on 56  
22 through 59; is that correct, Mr. Campbell?

1 MR. CAMPBELL: Yes, Your Honor. We move  
2 to admit 56 through 59.

3 JUDGE SIPPEL: All right. Then the  
4 documents which have been tabbed in Gulf Power's  
5 Notebook 4 of 5 as documents 56 through 59 are deemed  
6 marked for identification as Gulf Power's 56 through  
7 59 and are received in evidence as Gulf Power's  
8 Exhibits 56 through 59.

9 (Whereupon, the documents  
10 referred to were marked as Gulf  
11 Power Exhibit Nos. 56 through 59  
12 for identification and were  
13 received in evidence.)

14 JUDGE SIPPEL: Now, that leaves 60 to 62  
15 in this volume. Mr. Seiver, do you have any concerns  
16 about those documents other than what you've  
17 articulated?

18 MR. SEIVER: Well, Your Honor, 60 again is  
19 a new compilation document that we've never seen  
20 before. I presume it must have been prepared for one  
21 of the witnesses who was deposed, but is testifying.  
22 I don't know what it's based on where the numbers were

1 taken from. Again, it's more of a demonstrative  
2 exhibit, I guess, to support some conclusion as to  
3 what amount was paid compared to what amount they  
4 would have billed.

5 And with all of our other objections, if  
6 someone is going to use that, we can deal with it at  
7 the time, but I wanted to make sure that I objected to  
8 it beyond the usual.

9 MR. COOK: And I can add an extra  
10 clarification. Your Honor, it may be that 60 -- it's  
11 a list that includes what other people other than the  
12 four cable operators here are paid. So we would have  
13 certainly the same relevance objection to that.

14 When I took Mr. Spain's deposition, I  
15 asked him, you know, what research have you done, and  
16 one of his answers was, "I've looked at a sheet that  
17 includes information about what people other than the  
18 four cable operator complainants in this case are  
19 paying."

20 It may very well be that Mr. Campbell and  
21 Mr. Langley will tell you that this is the sheet or  
22 has some of that data from it, but that portion,

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1 again, we're first seeing last Friday.

2 JUDGE SIPPEL: Mr. Campbell.

3 MR. CAMPBELL: I'll say a couple of things  
4 about Exhibit 60, first and foremost, that it is the  
5 sheet that Mr. Spain referred to in his deposition,  
6 and as we identified on our exhibit list itself, it is  
7 a summary of voluminous evidence.

8 There is a specific Federal Rule of  
9 Evidence that deals with summaries. They are not  
10 demonstrative. They are entitled to be admitted into  
11 evidence. The necessary foundations are established  
12 in prefiled written direct testimony that we submitted  
13 and will be further established on the stand when  
14 these witnesses appear for live cross examination.

15 Specifically, it relates to Exhibit 65 and  
16 a summary of some of the voluminous data that is  
17 captured there. Exhibit 65 is a collection of  
18 documents that were produced in response to a  
19 discovery request propounded by the Complainants onto  
20 us that asked us for the evidence that we had that  
21 there is an unregulated market for pole space.

22 We responded. It's relied upon by our

1 expert, and it's captured in Exhibit 60 and 65, and we  
2 move that both be admitted into evidence.

3 JUDGE SIPPEL: All right. Let's not get  
4 to 65. We're trying to just focus on 62.

5 MR. CAMPBELL: Okay.

6 JUDGE SIPPEL: But as a proffer of  
7 relevance that's fine.

8 Where do we stand on this now?

9 MR. SEIVER: Well, Your Honor, as far as  
10 Exhibit 60 is concerned, anything that's misleading  
11 about it, for example, that might suggest that all 19  
12 are on one pole or any group of these people are on  
13 the same poles, we've had an argument that the four  
14 Complainants here show that the poles are crowded.  
15 Yet the evidence has shown that they're not all on the  
16 same poles. In different areas there are occasional  
17 overlaps where two cable operators that we represent  
18 may be on one pole and then an over builder like  
19 Knology.

20 But that can all be cleared up at hearing,  
21 and I still believe that if it's a compilation  
22 exhibit, then it's not independently admissible. If

1 we're going to get to Exhibit 65 and that's what's  
2 admissible, then I believe we can deal with Exhibit  
3 60.

4 JUDGE SIPPEL: Well, if it's not handled  
5 adequately by a compilation document, you say you're  
6 intending to have your experts are going to use this?

7 MR. CAMPBELL: The expert relied on the  
8 document, looked at the document, but we have a fact  
9 witness from Gulf Power who will testify about the  
10 document, and it is a summary.

11 JUDGE SIPPEL: All right.

12 MR. CAMPBELL: And there is a Federal Rule  
13 of Evidence there that deals with it. I can't  
14 remember the rule.

15 JUDGE SIPPEL: And that's going to be in  
16 your case-in-chief?

17 MR. CAMPBELL: Correct. One thousand and  
18 six is the Federal Rule of Evidence. It will be in  
19 our case-in-chief, yes, Your Honor.

20 JUDGE SIPPEL: All right. Well, that's  
21 part of your affirmative case. That's part of your  
22 burden with those witnesses. I mean, subject to it

1 being further shown to be reliable and a worthy  
2 document, since it being a compilation, subject to  
3 further, in other words, testimonial verification and  
4 noting the objection of Mr. Seiver and Mr. Cook, I'm  
5 going to receive it into evidence conditionally as  
6 your Number 60, Gulf Power 60.

7 What about 61 and 62?

8 MR. SEIVER: Well, Your Honor, 61 is a  
9 much bigger problem, and it is not something that we  
10 had seen before, but it's in the nature of a utility  
11 association brief. I'd say it's almost like an amicus  
12 brief.

13 JUDGE SIPPEL: Whoa, before we get to  
14 that, let's say what is it entitled. It's entitled  
15 what?

16 MR. SEIVER: APPA Pole Attachment  
17 Workbook.

18 MR. COOK: And, Your Honor, that stands  
19 for American Public Power Association.

20 JUDGE SIPPEL: All right, and it says that  
21 it was prepared for. There were individuals.  
22 Obviously they are authors, and it's prepared for the

1 American Public Power Association in December of 2002,  
2 right?

3 MR. SEIVER: Yes, Your Honor.

4 JUDGE SIPPEL: All right. Now, let's hear  
5 from Mr. Campbell. What's the proffer? What's the  
6 relevance of this?

7 MR. CAMPBELL: I will start with what it  
8 is, first. It's a document that was relied upon by  
9 the expert that we have that is testifying in the  
10 case, Mr. Roger Spain.

11 This is comparable, by the way, to many  
12 documents that Complainants have on their exhibit list  
13 that their experts relied on. They rely on the NESC,  
14 which is a book. They rely on a workbook, which is a  
15 book like this. They rely on a study concerning the  
16 Madrid Airport in one of their experts' books.

17 These are the types of things that experts  
18 rely on. They look at what data is out there, and  
19 they use it to form their opinions in the case.

20 In this particular instance Mr. Spain has  
21 looked at this document and said, "Hey, this industry  
22 that is out there, the pole attachment industry, has

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1 participants other than investor owned utilities.  
2 There are municipal utilities. There are cooperative  
3 utiltiies. I'm going to look at their practices, and  
4 I'm going to see what their practices are, what their  
5 construction specifications are would be an example;  
6 what their rates are would be an example. How do they  
7 deal with this joint use problem that we're here  
8 arguing about today?"

9 This is the document he relied on to do  
10 that.

11 JUDGE SIPPEL: Is that a trade association  
12 document?

13 MR. CAMPBELL: It is.

14 JUDGE SIPPEL: Would that be a fair  
15 characterization?

16 MR. CAMPBELL: That is a very fair  
17 characterization, and what it does is it captures a  
18 lot of the things that we're arguing about in this  
19 proceeding, including make ready techniques, including  
20 the rates that should be charged.

21 A lot of the issues that we address and  
22 deal with here, this provides us a comparison how

1 people outside of this regulated industry deal with  
2 these same problems and our expert relies on it.

3 JUDGE SIPPEL: Okay. It's a trade  
4 association document. I mean, they're admitted pretty  
5 readily it seems like.

6 MR. SEIVER: Well, for authentication  
7 purposes, but the relevance and the prejudice of  
8 having, you know, some public power association we've  
9 not examined the people at to argue about the FCC's  
10 formula and why and the where-how for going by that, I  
11 do admit that we list it on our exhibit list, exactly  
12 what our witnesses relied on. My understanding is  
13 that Mr. Spain never identified this before his  
14 deposition or during his deposition as something he  
15 relied on. This is somewhat news to us.

16 But I didn't expect that every text that  
17 they may have relied on would be admitted into  
18 evidence. It might be identified or marked or  
19 examined about, but just because they say, "I rely on  
20 this 77 page document" -- I'm sorry. Seventy-seven.  
21 It's well over a 100 page document.

22 Then that means I've got to go through

1 every page and say, "Did you rely on this page? Did  
2 you rely on this page? Why did you do that?"

3 I don't think it's admissible for any  
4 other reason, for any reason at all, let alone as a  
5 document that was relied, on without specification.  
6 I don't know how we can possibly get through a hearing  
7 in a month, let alone a week, if we have to take  
8 documents that he has relied on and pull out every  
9 single sentence to ask if that formed part of his  
10 opinion.

11 MR. CAMPBELL: I think we can deal with  
12 this in a more limited fashion. I think the manner of  
13 the questioning would be simple. If you put this  
14 voluminous document in front of the experts and asked  
15 him which part he relied on so that we don't have to  
16 go through each page.

17 But you know, just to get a flavor for the  
18 relevance of this document, you need only turn to the  
19 table of contents and look at, for example, page 6 of  
20 this document, which deals with some of the broad  
21 categories it has in it: the nature of a pole  
22 attachment agreement, uniform treatment of all

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1 attachments, reservation of capacity, principles of  
2 access, and then Chapter 4, pole attachment fees and  
3 rate methodology, the exact issue we're dealing with  
4 here in this proceeding.

5 And this is a document that is typically  
6 relied upon by experts. Mr. Spain did not identify it  
7 in his deposition because he didn't get it until after  
8 his deposition. He continued this research. They can  
9 cross examine him on that. They can cross examine him  
10 about the document. They can raise relevance  
11 objections in the flow of the testimony as it unfolds  
12 at the hearing.

13 But certainly for purposes of our  
14 proceeding here today, this document should be  
15 admitted.

16 MR. COOK: Your Honor, I'd like to just  
17 respond briefly. This is really gaming the system,  
18 but specifically, I'd like to draw your attention to  
19 page 29 and raise a bias objection to this specific  
20 document.

21 It's one thing for a document that an  
22 expert has relied upon to say, "Okay. This is

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